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Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

v.

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One (Pet. App. 24a-23a), is reported at 120 Ariz. 282, 585 P.2d 891. The judgments of the Arizona Superior Court (Pet. App. 19a-23a) are unreported, as is the order of the Arizona Supreme Court (Pet. App. 37a) denying review.

JURISDICTION

The opinion and order of the Arizona Court of Appeals were filed June 29, 1978. (Pet. App. 24a-35a.) A timely motion for rehearing was denied by that court on August 28, 1978. (Pet. App. 36a.) A timely petition for review by the Arizona Supreme Court was denied by order filed on October 4, 1978. (Pet. App. 37a.) The Petition for Writ of Certiorari was filed in this Court on December 29, 1978. The petition was granted on October 1, 1979. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257 (3) (1970).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim in the addendum to this brief, are as follows:

U.S. Constitution Art. 1 § 8
U.S. Constitution Art. 4 § 3
25 U.S.C. §§ 196, 406, 407, 466 and 476 (1976)
25 C.F.R. §§ 141 and 142 (1979)
Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona.
Ariz. Rev. Stat. Ann. §§ 28-1551, 28-1552, 28-1556 (1979 Supp.), 40-601 (1974) and 40-641 (1979 Supp.).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether comprehensive federal regulation of Indian timber preempts the State of Arizona from taxing a tribe's own use of tribal and BIA roads, through its non-Indian agents, on its reservation in the operation of its timber enterprise, where the State has no regulatory authority over and gives no financial support to those roads.

(2) Whether the tribal right of self-government is infringed upon by state taxation of the use by the tribe's non-Indian agents of tribal and BIA roads on the tribe's business on the reservation, where the state has no regulatory authority over and gives no financial support to the tribal roads the use of which is said to occasion the "compensatory" taxes.

STATEMENT OF THE CASE

A. *Procedural History.*

This is an action for refund of state taxes paid under protest brought originally by Petitioner Pinetop Logging Company[1] in the Arizona Superior Court, Maricopa County, on December 8, 1971. The taxes for which refunds are sought are the Arizona 2.5% gross receipts tax on motor carriers levied by Ariz. Rev. Stat. Ann. § 40-641 (1979 Supp.), denominated a "motor carrier license tax", and the Arizona 8¢ per gallon "use fuel tax" levied by Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.) upon the consumption of motor fuel on highways within the state. The Respondents, defendants below, are the Arizona state officials charged with collection and enforcement of the challenged taxes.[2] Similar refund actions have also been filed by other persons, and the parties have treated this suit as a test case.

The suit was broadened by the First Amended Complaint filed in February 1974 (Pet. App. 1a-18a), which joined the White Mountain Apache Tribe as an additional plaintiff

[1] "Pinetop Logging Company" is the business name of two Oregon corporations, E. H. Loveness Lumber Sales Company and Basin Building Materials Company, which jointly conduct the logging business which is the subject of this litigation. (Pet. App. 2a-3a.)

[2] The Respondents are Robert M. Bracker, Chairman of the Arizona Department of Transportation Board; Armand Ortega, Vice Chairman of the Arizona Department of Transportation Board; Edward J. McCarthy, Ralph A. Watkins, Jr., John W. McLaughlin, John Houston, and William A. Erdman, members of the Board, Arizona Department of Transportation; and Philip Thorneycroft, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division.

and sought also declaratory and injunctive relief against collection of the taxes.[3]

In March 1974 the parties filed cross-motions for partial summary judgment addressed to whether application of the state taxes to Pinetop Logging Company is prohibited by federal law. The evidentiary showing made by the Tribe and Pinetop on their motion for summary judgment was accepted as true by the State since the State elected to file no controverting affidavits. The Superior Court entered an order on May 28, 1975, rejecting all claims of federal protection against these state taxes. (Pet. App. 19a-20a.) The case then proceeded to trial on a purely state-law question over the manner of calculating the gross receipts taxes said to be due. After trial of that remaining issue, final judgment was entered September 7, 1976 denying the Tribe and Pinetop all relief. (Pet. App. 21a-23a.)

The Arizona Court of Appeals, Division One, affirmed the trial court's rejection of the Tribe and Pinetop's federal law claims against these state taxes. The state intermediate appellate court did uphold Pinetop's state-law claim under stipulated facts to a partial refund of the motor carrier license taxes, though the State's claim for motor fuel taxes was upheld in its entirety. (Pet. App. 24a-33a.) The Arizona

[3] The First Amended Complaint also joined as additional defendants the Arizona Corporation Commission and its members and the Governor and the Attorney General. It further sought relief against the new defendants prohibiting them from attempting to regulate the relationship between the Tribe and Pinetop as a "contract motor carrier of property" under the provisions of Ariz. Rev. Stat. Ann. §§ 40-601 *et seq.* (1974 & 1979 Supp.). These new defendants originally answered admitting that they claimed the authority to regulate Pinetop Logging Company's contract logging services for the Tribe on the reservation. (Answer to First Amended Complaint, ¶ XX, filed February 26, 1974.) However, after the filing of Appellants' Opening Brief in the Arizona Court of Appeals, those new defendants agreed that they would no longer attempt to regulate Pinetop Logging Company's logging services provided to the Tribe. Based on this settlement, these new defendants were dismissed from this litigation. (App. 4-5.) This case has since proceeded against the Arizona tax officials only.

Supreme Court declined to grant review of the decision. (Pet. App. 37a.) The case now comes to this Court on Writ of Certiorari.[4]

B. *Facts*

The facts of record in this case are undisputed. Although they are rich in detail, they can be summarized as follows:

1. The White Mountain Apache Tribe builds, owns, maintains, and regulates (together with the federal government) a system of roads, almost entirely unpaved,

[4] Parallel litigation is also pending in the U.S. District Court for the District of Arizona, No. CIV-73-788 PTC WEC. When the State first claimed taxes from Pinetop in late 1971, it was informally agreed that future disputed taxes would be paid under protest as they accrued, which has been done since November 1971. The State also threatened to collect some $30,000 said to be due for the periods between 1969 and November 1971. Since payment of this sum would have crippled Pinetop, the parties also informally agreed that collection of this $30,000 would be postponed until conclusion of the tax refund litigation.

In late 1973 the State determined to abandon this agreement and threatened to execute immediately on Pinetop's equipment to collect the $30,000. Since the Arizona courts have no power to enjoin collection of these taxes (Ariz. Rev. Stat. Ann. §§ 40-648 (A) and 28-1585 (A) (1979 Supp.)), the Tribe and Pinetop sued the same defendants in federal court on December 12, 1973 to enjoin collection of the taxes for the periods from 1969 to November 1971. A temporary restraining order was granted on December 13, 1973. At a hearing on January 14, 1974, the U.S. District Court determined to stay the federal action on the condition that the state officials consent to a continuation of the temporary restraining order at least until conclusion of the state court refund action. The state officials accepted the District Court's offer, the restraining order was continued (later modified to to a consent preliminary injunction on February 3, 1976), and no further action has been taken by the District Court.

The state court tax refund proceeding was wholly independent of the federal action, and the questions now before this Court on certiorari were fully litigated in the Arizona trial and appellate courts. The finality of the decision below for purposes of this Court's jurisdiction is therefore unaffected by the pendency of the federal action. *Cf. NAACP v. Button*, 371 U.S. 415, 427-29 (1963).

throughout its reservation. Many of these tribal roads are built and maintained as a part of the Tribe's proprietary timber harvesting enterprise. Agents of the Tribe use these roads when hauling tribal timber to the tribal sawmill.

2. The State of Arizona spends nothing to build, maintain, or police these tribally owned and BIA roads. Indeed, the State has no regulatory authority whatsoever over the use of these roads. The use of state roads is not involved in this suit.

3. The State of Arizona claims the right to tax the use of these tribal roads by the Tribe's agents when hauling tribal timber to the Tribe's sawmill. The State wishes to have these revenues to pay for building and maintaining wholly unrelated state highways located almost entirely off the reservation.

4. The road use the State seeks to tax is done as a part of the Tribe's own enterprise for the comprehensive management, harvesting, and marketing of Indian timber.

5. All the activities of the Tribe and of its non-Indian logger in this case are conducted on the reservation.

6. The activities of the tribal timber enterprise and of its non-Indian loggers are required by federal statutes and regulations to be, and are in fact, supervised and regulated in intimate detail by the federal government. The objects of that regulation are to achieve maximum sustained-yield harvesting, to promote Indian employment, to secure the entire financial benefit of the forest to the Indians, and to best compromise the economic and other values of the forest for the sole benefit of the Indians.

7. The economic burden of these taxes will pass entirely to the Tribe itself.

8. The economic effect of these taxes upon the Tribe, though not precisely determinable on this record, would be great. The Tribe has five other non-Indian loggers in addition to Pinetop Logging Company. The exactions from these two taxes would be many tens of thousands of dollars annually.

9. Federal protection from these taxes cannot result in any tax-motivated relocation of non-Indian activities onto the reservation. No unfairness to the state's off-reservation revenue raising interests or other abusive "marketing" of state tax immunities to non-Indians can occur here because reservation timber and tribal roads by definition are found only on the reservation and because the hauling of timber can only occur from where it is cut to the tribal mill, also on the reservation.

The full facts of record are as follows.

1. The Tribe and its Timber Enterprise.

The White Mountain Apache Tribe is a tribe of American Indians now numbering about 6,500 members and situated upon the 1,664,872-acre Fort Apache Reservation in the White Mountains of northeastern Arizona.[5] Some 720,000 acres of the reservation are commercial forest, of which approximately 300,000 acres are being utilized by selective cutting on a sustained yield basis. Under the present management plan for the forest, an area can be re-cut every 20 years without destroying the forest or damaging the watershed, which supplies about 35% of the water to the densely populated central portion of Arizona. (App. 8.)

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[5] The Fort Apache Reservation was originally created as the White Mountain Reservation by an executive order of President Grant on November 9, 1871. Modifications to the boundaries were made by subsequent executive orders on December 14, 1872, August 5, 1873, July 21, 1874, April 27, 1876, October 30, 1876, January 26, 1877, March 31, 1877, December 22, 1902, and February 17, 1912. The boundaries were also modified by the Act of February 20, 1893, 27 Stat. 467. The Act of June 7, 1897, 30 Stat. 64, separated the reservation into the San Carlos Reservation south of the Salt River and the renamed Fort Apache Reservation north of the Salt River.

The Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476 (1976). The Tribe supports its governmental and social programs almost entirely from its tribally-operated economic activities, of which its timber operations are by far the most important. For example, in 1971 the net profit from all tribal enterprises was $1,667,091, of which $1,508,713 was derived from timber operations. (App. 15.) All profits disbursed from the timber enterprise are used in tribal governmental, health, education and welfare programs. (App. 8.)

The Tribe's business name under which it manages, harvests, mills and sells tribal timber is Fort Apache Timber Company (FATCO).[6] FATCO is an economic enterprise of the tribe begun with funds borrowed from the United States government. It conducts all of its activities exclusively within the boundaries of the Fort Apache Indian Reservation. (App. 7, 16.)

Timber located on Indian reservation trust land is owned by the United States for the benefit of the tribe and cannot be harvested for sale even by the tribe without consent of the Congress. (*Infra*, 27-32.) The United States has entered into various contracts with FATCO allowing it to harvest reservation timber under the supervision of the Bureau of Indian Affairs, as will be explained in more detail later. Under these contracts, the Tribe directly receives royalties for the harvesting of its timber, and in addition FATCO may derive profits from the efficient processing and marketing of forest products. (App. 9.) FATCO is also a major on-reservation employer of Indians, employing approximately 300 tribal members. (App. 8.)

[6] For general discussion of FATCO see *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971), and *Graves v. White Mountain Apache Tribe*, 117 Ariz. 32, 570 P.2d 803 (App. 1977).

FATCO is responsible for the entire timber operation including selection and cutting of trees, hauling to FATCO's mill, manufacturing the logs into timber, and marketing the finished lumber and pulpwood chips. Some discrete aspects of this integrated operation have been contracted out to six loggers such as Pinetop Logging Company.[7] Specifically, after the trees to be cut are marked by Bureau of Indian Affairs employees, the Tribe's contractors fell the trees, de-limb them, cut them to proper size, and transport them to FATCO's sawmill. At that point FATCO's own employees again take over the process and segregate the logs and manufacture them into lumber and pulpwood. In addition, the marketing of the finished products is done by FATCO. (App. 9.) There are six different contractors who perform these logging services for FATCO. (App. 11-12.) The contractors are compensated by FATCO according to an agreed-upon scale for every 1,000 board-feet of timber delivered to the sawmill. (Pet. App. 5a.)[8] FATCO originally experimented with performing its own felling and hauling but found itself unable to do so economically. It has therefore availed itself of the expertise of loggers such as Pinetop Logging Company and has also thus

[7] The Tribe's use of contractors for logging is in accord with the general practice of private timber companies in Arizona. (Carpenter Depo. 100.) The loggers are "independent" only in the sense that they, rather than FATCO, own the trucks and equipment they use. They do not have any discretion or freedom with respect to how to carry out their day-to-day services for FATCO. Their actions are subject to complete control and direction by FATCO and the BIA, as is explained in detail in this brief.

[8] Where reference is made to the First Amended Complaint, appearing at Pet. App. 1a-18a, in support of factual statements in this brief, the allegation in question has been admitted in the Answer to First Amended Complaint filed February 26, 1974.

freed itself from the capital requirements of performing all the necessary felling and hauling itself. (App. 12.)

Pinetop Logging Company does not conduct any business activities in Arizona off the Fort Apache Reservation. (Pet. App. 6a.)

The loggers such as Pinetop are also an important source of on-reservation employment for tribal members, who have an employment preference under the logging contracts with FATCO. Pinetop employs at least 50 tribal members, and the six together employ from 50 to 100 Indians. (App. 8.)

Although FATCO is owned and managed by the tribal government and all profits belong to the Tribe, no profits can be distributed until all obligations to the United States government have been satisfied and disbursement is approved by the BIA. (App. 9.)

2. Federal Regulation and Supervision.

The federal government is charged by statute and regulation with pervasive responsibility over Indian reservation timber. In addition to its many specific duties, the BIA is generally responsible for preparation and implementation of "management plans for the forest resources ... with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specific period in the future." 25 C.F.R. § 141.4 (1979). Under 25 C.F.R. Parts 141 and 142, the Bureau of Indian Affairs has entered into contracts with FATCO allowing FATCO to harvest and sell reservation timber. These contracts impose detailed responsibilities on FATCO, many of which have been passed on in turn by subcontract to FATCO's loggers such as Pinetop. (App. 10.)

Indeed, the form contracts between FATCO and its loggers are prepared by the BIA and contain terms dictated and enforced by the BIA, even though the BIA is not a signatory to the contracts. (Carpenter Depo. 98.) All Pinetop's contracts with FATCO must be approved by the BIA. (App. 14.)

This pervasive federal supervision under regulations, contracts, and unwritten practices of the BIA extends to all aspects of the timber activities of FATCO and its contractors. For example, BIA foresters supervise the marking, cutting, and hauling of timber by FATCO and its contractors. (App. 12.) It determines which and how much timber will be cut (App. 12; Carpenter Depo. 56), and where and when roads will be built for the harvest of timber. (App. 10-11.) They pick out particular trees to be felled and determine which roads may be used and when. (Carpenter Depo. 54.)

The federal officials determine whether weather conditions will permit work, the direction in which felling should move, whether too much skidding is being done, where skid roads will be made, whether too much wood is left in an area, and how brush is to be piled. (Carpenter Depo. 56-57.)

BIA employees together with FATCO employees grade the timber for manufacture into lumber or into pulpwood chips. (*Id.* at 60.) In addition, they regulate many facets of the hauling of logs, such as speed, permissible road conditions, safety, and the width, length, height, weight and binding of loads. (*Id.* at 94.) The Bureau even dictates what types of tractors may be used by non-Indian loggers doing business with FATCO on the reservation. (*Id.* at 112.) BIA employees effect this supervision of Pinetop by daily instructions given in the field. This extensive supervision is summarized by the BIA head forester in charge of the Fort Apache Indian Reservation as "encompassing all aspects of

forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers." (App. 14.)

3. Tribal Roads.

Tribal roadways are at the core of FATCO's timber operations. Passable roadways are essential to an environmentally and economically successful timber management program. Furthermore, the construction and maintenance of passable roads throughout the mountainous reservation is one of the most important products of the timber program to the Indians.

There are three types of roadways on the Fort Apache Indian Reservation. One is federally funded Bureau of Indian Affairs roads. Another is state highways. A third is tribal roads financed and maintained by the Tribe, which includes roads constructed and maintained by FATCO and its contract loggers. (Pet. App. 6a.)

The State of Arizona contributes nothing to the construction or maintenance of tribal and BIA roads. Indeed, even though the state is supposed to maintain its own highways running through the reservation, some of the maintenance of state roads is done by the BIA and by the Tribe in order to keep them at acceptable levels of repair. (App. 13.)

In order to reach the timber stands, FATCO and its loggers expend substantial funds to construct and maintain tribal roads as required by the BIA superintendent. A high percentage of Pinetop's receipts in particular is spent to construct new roads and to maintain existing roads. Pinetop has separate personnel and equipment dedicated solely to road maintenance. (App. 11.)

Thus, the reservation's rural transportation system is financed in reality in large part out of the timber program. Because of this relationship between tribal roads and timber harvesting, the adequacy of the Tribe's road system for its members and its visitors is tied directly to the extent and to the financial successfulness of tribal timber activi-

ties. Accordingly, the Bureau of Indian Affairs also oversees every aspect of roadway planning, construction, and maintenance as an aspect of the tribal timber operation. The BIA superintendent polices the activities of FATCO and its contract loggers and dictates when repairs must be made on what roads. The contracts which give the loggers permission to use existing roads expressly subject that use to applicable BIA regulations and such other conditions as the superintendent may impose. FATCO and its contractors have all been required to agree to repair existing improvements on the reservation according to their proportionate use of the roads. The BIA superintendent has the authority to order maintenance or repair of any roads used by the contractors. The only recourse from the superintendent's orders is to the Area Director of the BIA. (App. 10, 13.)

In a few places FATCO's contractors are required to use or cross state highways. Accurate records are kept of the mileage on state highways, and use fuel and motor carrier license taxes allocable to those uses have been paid without protest and are not involved in this lawsuit. (Pet. App. 9a; App. 11.)

4. The Arizona Motor Carrier License Tax and Use Fuel Tax.

Under Ariz. Rev. State. Ann. § 40-641 (1979 Supp.) contract motor carriers of property as defined in Ariz. Rev. Stat. Ann. § 40-601 (1974) are taxed at 2.5% of their gross receipts to support "the maintenance of Arizona highways from parties who enter into business arrangements which look directly to the inordinate use of public highways to realize pecuniary benefits."[9]

This gross receipts tax, denominated a "motor carrier license tax," is "a privilege tax . . . on the right to do business in a certain manner." *Shaw v. State*, 8 Ariz. App. 447, 451, 447 P.2d 262, 266 (1968). The tax is required of persons

[9] *Campbell v. Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966); *Purolator Security, Inc. v. Thorneycroft*, 116 Ariz. 394, 396-97, 569 P.2d 824, 826-27 (1977).

who carry property for compensation by motor vehicle on "any public street, alley, road, highway or thoroughfare of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic." Ariz. Rev. Stat. Ann. § 40-601(A) (11) (1974).

Under Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.) a tax of 8¢ per gallon is levied upon the use of fuel to propel a motor vehicle on "any highway within the state," which includes "any way or place in the state of whatever nature open to the use of the public." Ariz. Rev. Stat. Ann. § 28-1551(4) (1979 Supp.). The statute itself states that the tax is levied "for the purpose of partially compensating the state for the use of its highways." Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.).

Thus, both taxes are taxes on road use. The use fuel tax is on the using of fuel on "any highway," and the motor carrier license tax is on using roads for certain commercial purposes.

Although the articulated objective of these taxes (compensating the state for the use of "its" roads) has no application to the use of tribal roads by agents of the tribe in connection with the tribe's own business, nevertheless, these statutes literally apply here because the tribal roads are in fact used by the public[10] and are "within this state." *Cf.* Ariz. Rev. Stat. Ann. §§ 28-1552, 25-1551(5), and 40-641(B) (1979 Supp.).

[10] The unfairness of the State of Arizona's claim to tax the Tribe's own use of its roads is further confirmed by the fact that the Tribe could prevent these state taxes on its agents by excluding all non-Indian hunters, fishermen, and recreationists. The roads would then no longer be "open to the use of the public" within the language of these statutes. It is only because the Tribe has not sought to exclude nonmembers from the use of these roads for the enjoyment of the reservation that these taxes are owing even under the overreaching language of the statutes themselves.

When Pinetop Logging Company first began logging for FATCO in 1969, it did not anticipate any liability for these taxes. In 1971, the Respondent State officials began assessing these taxes against Pinetop. (Pet. App. 6a-7a.) The State further claims the right to tax all travel by non-Indians that occurs over tribal and BIA roads on the reservation. (Pet. App. 8a-9a.)

5. Economic Impact of These State Taxes on the Tribe.

The financial burden to the Tribe from collection of these taxes from its loggers would be very great. Pinetop is one of six non-Indian contractors logging for FATCO on the reservation. (App. 8.) Other refund litigation in the state courts has been stayed to await the outcome of this test case. It is also agreed that the situation presented in this case occurs as well on other Indian reservations in Arizona. (Pet. App. 3a.)

Although the nominal taxpayer selected by the State of Arizona in this case is the non-Indian logger, since Pinetop Logging Company is doing business directly with the Tribe as a part of the Tribe's own comprehensive timber enterprise, any taxes which may be collected from Pinetop must be passed on to the Tribe as a part of Pinetop's cost of doing business with and for the benefit of FATCO. (App. 11, 15.) After these taxes were demanded by the State, FATCO was compelled to agree to pay them in the future on behalf of Pinetop rather than lose Pinetop's services (App. 11), though no such indemnity has been given for back taxes accrued before 1971.

The exact financial loss to the Tribe from the collection of these state taxes from its non-Indian loggers cannot be determined precisely from the present state of the record. Only one of six such loggers is a party in this case. The State has claimed assessments in the range of $30,000 for a two-year period between 1969 through November 1971 against Pinetop Logging Company alone. In addition, Pinetop paid $33,816.01 under protest between November 1971

and May 1976, and additional protest payments have continued since then. The amounts paid under protest are Pinetop's estimates and have not been audited by the State.

The Arizona Court of Appeals sought to belittle these taxes by suggesting that "only $9,000 annually in excise privilege taxes is going to be borne by the tribe." (Pet. App. 31a-1.) In fact, this $9,000 figure was taken by that court from a speculation in the State's brief which was not grounded in the evidence of record.

For the reasons stated above, the amount of taxes already paid under protest in this case probably reflects only a small portion of the true economic impact of these state taxes on the Tribe. Petitioners believe the extent of these taxes on all FATCO's operations, if allowed, would be many tens of thousands of dollars annually.

SUMMARY OF ARGUMENT

State motor fuel and gross receipts taxation of a tribal agent's use of tribally owned, built, and maintained roads and BIA roads on the reservation is preempted by comprehensive federal regulation of Indian timber. This preemption flows both from congressional occupation of the field of managing, harvesting, and marketing Indian timber and from specific congressional economic objectives to the utilization of Indian timber, which are frustrated by interposition of the state's unrelated revenue raising purposes for the support of off-reservation services.

Like the federal regulation of Indian traders held to be preemptive of state sales taxes in *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965), federal regulation of Indian reservation timber dates back more than a century. Since as early as the 1890's, Congress has fully taken in hand all aspects of the management, harvesting, and marketing of reservation timber. Every aspect of Indian timber utilization from the highest level of planning down to the day-to-day activities of harvesting are supervised by federal officials.

The historic objectives of this intensive federal regulation have been primarily economic. Their general design is to secure to the Indians the entire economic benefit to be had from the timber. A specific economic objective fully articulated by Congress and the executive branch beginning in the Nineteenth Century is to use tribal timber as a base for on-reservation employment of Indians. Perhaps no economic policy of Congress is of greater importance to the preservation of Indian communities, culture, and welfare than the development of employment opportunities for Indians on the reservation so that they will not have to abandon their families and their traditional cultures in order to enjoy even a minimally decent standard of living.

Another important objective of comprehensive federal regulation of Indian timber is the statutorily required sustained-yield management of the forest. This philosophy of forest utilization entails many difficult judgments in the compromise of competing values of the forests for economic utilization, environmental preservation, recreation, and aesthetic enjoyment. Unitary management of the forest is essential if these competing values of the forest to the Indians are to be best promoted. Intrusion of state revenue raising objectives for the building of off-reservation roads will disturb and disarrange the complex and delicate task of multipurpose management of the forest for the sole benefit of the Indians.

The State, by contrast, can point to no specific justifications for taxing the use of tribal roads by the tribe's own agents in connection with its timber enterprise. The State offers no services or other compensating benefits and indeed intends to use these tax revenues entirely for the building and maintenance of unrelated state highways.

This federal regulation of Indian timber constitutes an occupation of the field which implicitly excludes state regulation, especially state taxation, of the same subject matter. Furthermore, these state taxes thwart the historic economic objectives of Indian timber utilization.

Even apart from the preemptive force of the comprehensive federal regulation of Indian timber, these state taxes must fall under the doctrine that "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee,* 358 U.S. 217, 219-220." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* ___ U.S. ___ , 99 S. Ct. 740, 746 (1979).

Though the limit of the "infringement doctrine" protection against state taxation of non-Indian activities on the Indian reservation may be difficult to define in many cases, it is not at all difficult to see that that doctrine must protect against these state taxes in the circumstances of this case.

Since the infringement doctrine is the omnibus tool for judicial prevention of inappropriate state intrusion into reservation affairs which more properly should be left to the Indians, application of that doctrine may fairly allow inquiry into the substantiality of both the tribe's and the State's legitimate interests in having a given activity subject to or free from state regulation. Examination of all the legitimate indicia of tribal interests and of all the legitimate indicia of state interests in this case shows that the state interests in collecting these taxes fall far short of justifying the palpable intrusion they would cause into the internal affairs of the Indians.

The road use which the State seeks to tax is the Tribe's own use of its own roads through its non-Indian agents. The road use is an integral part of a comprehensive tribal timber management and harvesting system entirely directed and controlled by the Tribe and the federal

government. The specific incidence of these state taxes falls in part upon the use of roads. Yet those roads are Indian reservation trust land beneficially owned by the tribe and in which the state has no proprietary or regulatory interest.

The State itself has no palpable justification for taxing the use of these roads. The State has no regulatory or police power over the roads, and it spends no funds whatsoever to build, maintain, or police them. Indeed, the very justification articulated for these state taxes under the state statutes and case law is to "compensate" for the use of the *state's* roads—a justification which shows the unfairness of collecting these taxes in this case.

Furthermore, there is no possibility that the tax immunity claimed in this case could be abused by "marketing" immunities from state taxes to non-Indians. The activity in question—hauling tribal timber on tribal roads to the tribal sawmill—is incapable of being relocated from off the reservation to on the reservation in response to perceived tax advantages. Thus, there is no possibility that other activity which in the ordinary course would take place off the reservation and which the state fairly has justification for taxing might be induced to relocate onto the reservation. So, for example, unlike the sale of price elastic goods such as cigarettes, federal immunity from state taxation of a tribe's own use through its non-Indian agents of its own roads cannot be manipulated to the unfair disadvantage of the state's off-reservation revenue raising interests.

In summary, all the criteria under the infringement doctrine for excluding state jurisdiction suggest that the state taxes in this case are unjustified. There is nothing on the state's side of the scale.

ARGUMENT

I. PREFACE: CLEAR CONGRESSIONAL OBJECTIVES ARE OBSTRUCTED BY STATE TAXATION OF THE USE OF TRIBAL ROADS BY THE TRIBE'S OWN LOGGERS.

This Court has granted certiorari to consider two questions in this case. The first question is whether comprehensive federal regulation of Indian timber preempts state gross receipts and motor fuel taxes on a tribe's use of its own roads, through its non-Indian agents, where the roads are used and the gross receipts are earned in the cutting and hauling of tribal timber as a part of the tribe's timber management industry. The second question is whether, as applied in this case, these state taxes are prohibited by the doctrine that states may not exercise jurisdiction over non-Indian activities on the reservation where to do so would infringe on tribal self-government. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 179 (1973).

This case presents as clear an instance as possible of a state's attempt to swell its treasury by taxation of on-reservation activities for which the state has no regulatory rights or duties and in connection with which it spends no public money to provide services or other compensating benefits. Typically, the effect of taxation throughout the state is to provide services for taxes. But its effect when applied on the reservation in this case is not to force the user of state services to pay his fair share of their cost, but rather to deliver a windfall to the users of state services by making *tribal* programs pay a share of the cost of state programs. Thus, the Tribe pays twice, once to finance the tribal services and facilities themselves and once again to the State for the "privilege" of using the Tribe's own facilities. We think well established doctrines of federal Indian law are fully adequate to prevent this exploitation of the Tribe.

The courts' task in adjudicating the boundary lines between state and tribal/federal authority is one of identifying the legitimate interests of the tribes and of the states. It bears emphasis that the selection of the objects of Indian policy and the corresponding expansions and contractions of state and tribal authority are legislative matters within the plenary control of Congress. *Washington v. Confederated Bands and Tribes of the Yakima Nation,* ___ U.S. ___, 99 S. Ct. 740, 761 (1979). Thus, we always look first to the treaties, statutes, and administrative regulations adopted thereunder to find if Congress has specifically allocated a given power between the tribes and the states. If explicit legislation speaks to the point, the inquiry is ended.[11]

However, a congressional intent to exclude state authority over a given matter can appear from the totality of congressional action in the field as well as from the letter of the statutes. Thus, congressional exclusion of state law can be inferred from congressional preemption of a field of specific legislative concern. *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

A distinctive application of federal preemption flows from tribal sovereignty, the federally protected right of tribal self-government,[12] a right which is rarely stated in the express language of the treaties and executive orders but which is fundamental to the tradition of federal Indian policy. From that doctrine has evolved:

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[11] *E.g.,* 25 U.S.C. § 398c (1976) (authorizing state taxation of certain mineral production on the reservation); 25 U.S.C. § 231 (1976) (authorizing state health and sanitation jurisdiction on reservations); 25 U.S.C. § 1901 *et seq.* (1976) (the Indian Child Welfare Act, granting tribal courts jurisdiction and excluding state court jurisdiction of certain child custody disputes); 28 U.S.C. § 1360 (1978) (granting some state courts jurisdiction to hear civil disputes arising on the reservation between Indians).

[12] The preclusion of state jurisdiction flowing from the right of tribal self-government is viewed in modern jurisprudence as an aspect of federal preemption. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worchester v. Georgia*, 6 Pet. (31 U.S.) 515, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee*, 358 U.S. 217, 219-220. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 99 S. Ct. 740, 746 (1979)

Preemption by comprehensive federal regulation and the infringement doctrine are related in their doctrinal origins under the Supremacy Clause and in the specific modes of analysis employed by each. Inquiry into implied federal preemption by comprehensive regulation is multifaceted. Analysis of the relative strengths of tribal and state interests under the infringement doctrine takes similar account of many considerations. The relevant considerations are often the same under both rubrics.

The primary consideration under both doctrines is the relevant congressional action. Where the Congress has identified specific objectives which are obstructed by the state law, the state law must yield on simple preemption principles.

When applying the infringement doctrine, we frequently have less direct guidance from Congress on what specific tribal interests come within the prerogative of "tribal self-government" deserving of protection from state interference. That doctrine does serve the vital function of tempering all inappropriate state impositions upon the practical ability of tribes to control their own affairs on their reservations, even when the specific subject matter has not received extensive legislative attention.

But even under infringement analysis, Congress may have spoken to the importance of the tribal interests which weigh in the balance against the state's claim to regulate, thus providing useful though indirect assistance in resolving the state's claim to jurisdiction.

In this case Congress has spoken with clarity and without compromise. The entire benefit of tribal timber utilization belongs to the Indians. The entire responsibility for managing tribal timber lies with the Indians and the federal government. The entire cost of tribal roads is borne by the Tribe and the BIA. Timber utilization is a major instrument of the congressional policy of alleviating Indian poverty. The State has no authority to regulate the use of tribal lands in general or tribal roads in particular. The State has nothing to weigh in favor of its desire to tax the use of tribal roads.

This is not one of those cases in which tribal and state interests fairly weigh against each other, thus requiring the courts to finely measure all the circumstances to find the balance. Congress has here placed a brick onto the tribal side of the scale. While some cases may be hard, this case is not.

We turn first to the claim of preemption by comprehensive federal regulation.

II. THE STATE ROAD USE TAXES ON GROSS RECEIPTS AND FUEL CONSUMPTION ARE PREEMPTED BY COMPREHENSIVE FEDERAL REGULATION OF INDIAN RESERVATION TIMBER.

The Arizona motor carrier license tax and use fuel tax on tribal loggers are implicitly preempted by comprehensive federal regulation of Indian timber, both because the field of Indian timber has been occupied by the federal government and because the State's revenue raising is an obstacle to the specific economic purposes of congressional regulation of Indian timber.

A. The Controlling Importance of *Warren Trading Post*.

Perhaps few fields of law are less amenable to accurate generalizations than the field of federal preemption of state laws. Claims of implied federal preemption can be examined only in the concrete, though some general principles, more helpful as beginning points of the inquiry than as solutions to any given problem, can be stated.

Three of the more important factors to be considered are given in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956): (1) whether "the scheme of federal regulation is so pervasive as to make reasonable the inference that congress left no room for the states to supplement it," (2) whether the federal statutes "touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject," and (3) whether state enforcement "presents a serious danger of conflict with the administration of the federal program." *Id.* at 502, 504, 505.

This model of preemption considerations—pervasiveness in fact of the federal regulation, dominance of the federal interests in the subject matter, and risk of conflict with federal administration—is drawn from a case not dealing with preemption of taxes. Therefore, this list of major concerns does not specify a particular type of interference with federal administration which will be of acute interest when the preemption claim touches state taxation. That is the effect of the state taxation on the specific economic objectives of the federal program.

Indeed, where this last factor of risk of interference with federal administration passes from risk to probability, it enjoys an independent preemptive significance even where the federal legislation does not amount to a complete "occupation of the field". It is sufficient to exclude state law that the state law "stands as an obstacle to the accomplish-

ment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977).

The preemptive significance of either full occupation of the field or obstruction of specific congressional economic objectives comes clearly into focus in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), a case so strikingly similar to this one that it overshadows all other precedents. *Warren Trading Post* held that federal regulation of reservation traders occupies the field of trading with Indians to the extent of implicitly preempting state taxation of the gross receipts of licensed traders.[13]

The statutes found preemptive in *Warren Trading Post* were 25 U.S.C. §§ 261 and 262 (1976), enacted in 1876 and 1901, which authorized the Commissioner of Indian Affairs to license and to "appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians." These statutes were implemented by detailed regulations appearing at 25 C.F.R. Parts 251 and 252 (1979).

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[13] The preempted tax in *Warren Trading Post* was the Arizona transaction privilege tax, which is not a sales tax but rather a tax on the privilege of engaging in the retail sales business in Arizona, measured at 2% of gross receipts. Ariz. Rev. Stat. Ann. §§ 42-1309 and 42-1312 (1979 Supp. Pamph.). The transaction privilege tax in *Warren Trading Post* is essentially identical to the motor carrier license tax since both are privilege taxes measured by a percentage of gross receipts, though they are separately enacted and separately codified in the Arizona Revised Statutes. Under each statute it is forbidden to engage in the taxed activity without a license from the State, and the gross receipts tax is levied on the license. A distinction between the two taxes is that while the transaction privilege tax is a tax on the privilege of doing certain businesses in the state in general, the motor carrier license tax is a tax on the privilege of doing business by burning fuel on roads and is used solely for state highway financing.

This Court noted initially that the statutes and regulations "would seem in themselves sufficient to show congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. This appearance was strengthened by the historic congressional policy of leaving Indians "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Id.* Thus, it was the Federal Government, not the State, which "provided for roads, education and other services needed by the Indians." *Id.*

This Court further concluded that the statutory objective of federal price regulation of goods sold to Indians would be upset in fact by the state taxes:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. *Id.* at 691.

In summary, the state tax in *Warren Trading Post* was preempted both because the United States had occupied the field and because the state tax "would to a substantial extent frustrate" the specific federal concern with the economics of the regulated activity, *i.e.*, a concern that prices be fair and reasonable to Indians.

The management, harvesting, and marketing of Indian timber is likewise the subject of long-established and pervasive federal regulation. It is similarly a field of dominant federal interest in which the State has no responsibility for services and delivers none. Most importantly, it is, to an even greater degree than Indian trading, a field in which Congress has identified specific economic objectives to its regulation, objectives which not only "could" be disturbed and disarranged by the State's competing revenue-raising ends but plainly are disrupted on the facts of record.

B. The History and Extent of Federal Regulation of Indian Timber.

An historical review of the law of Indian timber and of Congressional and executive regulation of it will show that all the criteria for preemption by federal occupation of the field are met, and further that such regulation has specific economic objectives which will be upset by these state taxes.

This Court first discussed the distinctive nature of property in Indian timber in *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1874), which held that Indians have no right to cut timber for sale without consent of Congress. The Government brought a replevin against the buyers of saw logs cut and sold by the Indians, claiming the Indians had no power to pass good title to the logs to their buyers. In holding for the Government, the Court equated the Indians' property interest in the timber with the interest they held

in the land itself under the doctrine of Indian title,[14] saying:

> The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. . . .
>
> The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. . . . If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber, when cut, becomes the absolute property of the United States. *Id.* at 592-94.

The primacy of the federal interest is so great that even innocent purchasers of timber wrongfully cut by Indians are liable to the Government for the full value of the logs at the time they receive them. *E. E. Bolles Wooden Ware Co. v. United States*, 106 U.S. 432 (1882).

After the decision in *United States v. Cook* it became common for Congress to enact special statutes authorizing the sale of Indian timber, providing always that the proceeds of such disposition should accrue to the benefit of the

[14] *See generally, Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974).

tribe concerned.[15] Congress was aware even in those early times that timber harvesting presented a valuable opportunity for employment of Indians and for educating them into the economic life and the habits of self-sufficiency thought desirable by the whites.[16]

The first statute of general applicability to Indian timber was an amendment to a criminal statute to prohibit cutting trees on reservations or allotments. Act of June 4, 1888, 18 U.S.C. § 1853 (1976).

The first general authorization of sale of Indian timber was the Act of February 16, 1889, 25 Stat. 166, 25 U.S.C. § 196 (1976), which permitted the sale of dead and down timber under regulations to be adopted by the President.

[15] Examples of such statutes collected in U.S. Dept. of Interior, *Federal Indian Law* 657 n. 19 (1958) are the act of April 25, 1876, 19 Stat. 37 (Menomonee); act of July 5, 1876, 19 Stat. 74 (Kansas Indians); act of June 17, 1892, 27 Stat. 52 (Klamath River Indian Reservation); act of April 23, 1904, sec. 11, 33 Stat. 302, 304 (Flathead Indian Reservation); act of June 5, 1906, 34 Stat. 213 (Kiowa, Comanche, and Apache); act of March 28, 1908, 35 Stat. 51 (Menominee); act of May 29, 1908, 35 Stat. 458 (Spokane).

[16] For example, in the committee reports on the Act of March 28, 1908, 35 Stat. 51, dealing with timber on the Menominee reservation, it is stated in favor of the bill that "erection of sawmills and a lumber producing plant on the reservation will give [the Indians] work during the entire year," that with the benefit of federal supervision the timber supply will be made continuous, and that the Indians will have the income from the timber. H. Rep. No. 1086, 60th Cong. 1st Sess., 1-2 (1908). The Senate Report criticizes existing logging practices under which "the Indian received some financial benefit, but the system does nothing to educate him in the practical work of manufacturing the timber into lumber nor in the preservation and perpetuation of the forest." Instead, the proposed legislation places "the care of the forests and the harvest of the forests' crop ultimately in the hands of the Indians upon these reservations." S. Rep. No. 110, 60th Cong. 1st Sess., 2 (1908).

The regulations adopted in 1890 pursuant to that statute are described in *Pine River Logging Co. v. United States,* 186 U.S. 279 (1902), and reflect a primary concern with encouraging Indian employment and with reserving the exclusive financial benefit to the Indians.

The Court summarized the federal timber policy evidenced by the statute as follows:

> The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited quantity of dead and down timber under the superintendency of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that 10 percent of the gross proceeds should go to the stumpage or poor fund of the tribe from which the old, sick, and otherwise helpless might be supported. *Id.* at 285-6.

The Court also noted that the object of the statute was not just to secure the benefits of timber utilization to the Indians but also to spread those benefits among as many of the Indians as possible without monopolization of the work by a few. *Id.* at 286.

In *United States v. Paine Lumber Co.,* 206 U.S. 467 (1907), the court distinguished *Cook* and *Pine River Logging Co.* and held that an Indian allottee had the right to cut timber for sale without specific authorization from Congress.

This judicial qualification on the overriding interest of the United States in Indian timber was mitigated in *Starr v. Campbell,* 208 U.S. 527 (1908), which upheld presidential regulations adopted on December 6, 1893 governing certain sales of timber on allotments. In any event, Congress in 1910 firmly re-established its control over Indian timber on allotted lands as well as on unallotted lands in the Act of June 25, 1910, 36 Stat. 857, ch. 431 §§ 7 and 8. Section 8, 25 U.S.C. § 406 (1976), authorized the sale of timber on an allotment by the allottee with the consent of the Secretary

of the Interior, the proceeds to go to the benefit of the allottee under regulations to be prescribed by the Secretary. Section 7, 25 U.S.C. § 407 (1976), authorized the sale of living and dead and down timber on allotted lands under secretarial regulations, with the proceeds to be used "for the benefit of the Indians on the reservation." These sections were enacted at the request of the Secretary of the Interior to fill the need for a general authorization to harvest living timber. In a letter to the Speaker of the House of Representatives, the Secretary pointed to the financial and educational benefits to the Indians from reservation timber industries.[17]

Congress updated 25 U.S.C. §§ 406 and 407 in 1964. Act of April 30, 1964, 78 Stat. 186. Section 407 was amended to expressly state that timber on unallotted lands should be sold "in accordance with principles of sustained yield or in order to convert the land to a more desirable use . . ." The House Committee Report on this amendment evidences a federal concern with all aspects of Indian forest management:

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[17] The letter states in part:

> It is believed by this department that there should be a general law applicable to all Indian lands, because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.
>
> It is also important that there be authority to cut the mature timber from unallotted Indian lands, because much of it goes to waste under existing conditions. If the timber could be cut, it would furnish employment to Indians who now are unable to find work; it would furnish funds for tribal uses which could take the place of funds that must now be appropriated from the Treasury for their support. The department is doing everything it can to induce the Indians who have been living in accordance with their primitive habits to take up gainful pursuits. In many cases this problem could be solved by furnishing employment in cutting the timber, which is the most available industry to which their lands could be turned. H. Rep. No. 1135, 61st Cong. 2d Sess. 3 (1910).

> In enacting S. 1565 the Committee wishes it to be clearly understood modern means of reforestation practices as well as harvesting operations will be pursued in the implementation of the legislation. H. Rep. No. 1292, 88th Cong. 2nd Sess. (1964); 1964 U.S. Code and Adm. News 2162.

Although there had been some earlier administrative opinions suggesting that the tribes did not enjoy even the beneficial interest in timber under the general principles announced in *Cook* and *Pine River Logging Co,*[18] those misapprehensions were laid to rest by these express congressional declarations that the proceeds of Indian timber were to go to the benefit of the Indians. It was subsequently held that the tribes do enjoy the beneficial ownership of reservation timber and thus that the Court of Claims could properly award compensation for the timber value of Indian lands improperly taken by the United States. *United States v. Shoshone Tribe of Indians,* 304 U.S. 111 (1938), and *United States v. Klamath and Moadac Tribes of Indians,* 304 U.S. 119 (1938). As this Court stated in *United States v. Algoma Lumber Co.,* 305 U.S. 415 (1939):

> Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians. *Id.* at 420-21.

The tribe's beneficial ownership of the timber, notwithstanding the Government's fee interest and plenary regulatory rights, is also confirmed in the holding of *United States v. Algoma Lumber Co.,* 305 U.S. 415 (1939), that the

[18] 19 Op. A.G. 194 (1888) and 19 Op. A.G. 710 (1890).

tribe is the seller of timber under a contract and that therefore no action will lie against the Government for breach of the contract, even though the Secretary is a signatory to the contract.

The Secretary's mandate to adopt implementing regulations under the 1910 Act has resulted in extensive administrative regulations under that statute dating from June 9, 1911. Those regulations and their successors have continued from the commencement of that statute until the present. *Cf. United States v. Eastman,* 118 F.2d 421 (9th Cir. 1941).

The intimation in *United States v. Paine Lumber Co.,* 206 U.S. 467 (1907), that the more individualized property interests of allottees might exclude their uses of allotment timber from the scope of federal regulation has proven unfounded. Extensive supervision of allotment timber cutting under 25 U.S.C. §§ 196 and 406 has been fully sustained as necessary to fulfillment of the federal trust responsibility to the allottees and to sound management of the forest as a whole. *United States v. Eastman,* 118 F.2d 421 (9th Cir. 1941); *cf., Quinault Allottee Association v. United States,* 485 F.2d 1391 (Ct. Cl. 1973).

The current regulations, appearing at 25 C.F.R. Parts 141 and 142, define the general objectives of the management of allotted and unallotted Indian forest land (§ 141.3), affirm the statutory requirement of sustained-yield management and require the BIA to adopt management plans for the forest (§ 141.4), closely restrict clear cutting (§ 141.5), encourage and provide special provisions for tribal logging and sawmill enterprises (§ 141.6), allow sale to non-Indians where the volume of timber available for cutting exceeds what can be developed by the Indians (§ 141.7(a)), allow the Secretary to sell timber on allotments without the consent of the allottees in certain emergency situations (§§ 141.7(b) and (c)), establish detailed procedures for the ad-

vertisement and sale of timber (§ 141.8),[19] authorize sales of cutting rights to Indians in some circumstances without adherence to the advertisement and auction procedures (§ 141.9), require deposits together with bids and prescribe manner of payment of the deposits and forfeiture of deposits if the high bidder does not perform the contract (§ 141.10), state circumstances in which a high bid can be rejected (§ 141.11), provide that contracts for sale of cutting rights shall be upon contract with the tribe approved by the Secretary (§ 141.12), define who must sign contracts (§ 141.13), require performance bonds (§ 141.14), describe the manner of payment (§§ 141.15 and 141.16), define the maximum time period for which a contract can be granted (§ 141.17), implement the statutory requirement of deductions from proceeds for federal administrative expenses of managing and protecting the forest (§ 141.18), establish alternate procedures for non-bid cutting permits (§ 141.19), define the terms on which Indians may cut for their own use without permits (§ 141.20), authorize the Secretary to fight forest fires (§ 141.21), establish procedures for protection of timber unlawfully cut and for recovery of penalties (§ 141.22), and establish administrative appeal procedures (§ 141.23).

Part 142 supplements Part 141 with specific provisions governing sale of forest products. Those regulations require advertisements in lumber trade journals and elsewhere (§§ 142.5 and 142.6), authorize sales to governmental entities (§ 142.8), define the payment terms (§§ 142.9 and 142.10), authorize commission sales through agents (§ 142.11), and require deposits on future deliveries (§ 142.12).

[19] Indeed, this section again confirms the overriding policy of securing the economic advantage of timber utilization to tribal members since it provides that auctions may be limited to members of the tribe and that members may be granted the privilege of meeting a higher bid submitted by a non-Indian.

The Secretary of the Interior is further directed by the Indian Reorganization Act "to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management. . . ." 25 U.S.C. § 466 (1976).

From this brief survey several conclusions emerge. First, the entire beneficial interest in reservation timber belongs to the tribe or to the allottees, as has been repeatedly confirmed by Congress in both general statutes and special legislation. Second, the federal regulatory power is plenary and has been exercised for more than a century over even the most minute details of the management, harvesting, and sale of Indian timber. Third, the Congress and the executive have explicitly indicated since as early as 1889 that Indian timber is to be managed both to provide on-reservation employment to Indians and give them the opportunity to alleviate through their own efforts the poverty which afflicts so many of them. Fourth, forest utilization should be an opportunity to the Indians to learn to direct their own collective affairs free of interference from others. Fifth, utilization of the forest must be done on a sustained-yield basis, with due regard to the other values of the forest to the Indians. Finally, it has been recognized as early as the 1890's that achievement of these goals will sometimes require the assistance of non-Indians, which assistance has been closely monitored by federal administrators to assure that such non-Indian involvement is consistent with the substantive federal objectives of Indian timber programs.

These historic federal objectives are conveniently restated at 25 C.F.R. § 141.3 (1979), a regulation which took its present form in 1964.[20] Those objectives are (1) "the preservation of such lands in a perpetually productive state . . . by applying sound silvicultural and economic principles to the harvesting of the timber," (2) "the regulation of the cut . . . so as to make possible continuous production and a perpetual forest business," (3) the development of

[20] 29 Fed. Reg. 14740 (1964).

Indian forests by the Indian people "for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform," (4) the sale of excess timber in open competitive markets "where the volume that should be harvested annually is in excess of that which is being developed by the Indians," (5) "the preservation of the forest in its natural state whenever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products," (6) sound watershed management and minimization of erosion, (7) "the preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians."

The same objectives are stated for the management of allotted forest lands except that additional emphasis is given to the financial needs of the allottees and their heirs. 25 C.F.R. § 141.3(b) (1979).

C. Federal Regulation of Indian Reservation Timber Harvesting Occupies the Field to the Exclusion of State Taxation of the Same Subject Matter.

1. Federal regulation is pervasive in fact.

The pervasiveness in fact of federal regulation of Indian timber is apparent from the foregoing summary of the history of federal supervision of Indian timber. In addition, the facts of record in this case show federal supervision of even the most minute and routine details of the timber activities of Fort Apache Timber Company and of its loggers. Pinetop Logging Company's every action is directed by the BIA or by FATCO on a daily basis. The scope and detail of

this actual federal regulation is plainly sufficient to make it reasonable to infer "that Congress left no room for the states to supplement it." *Commonwealth of Pennsylvania v. Nelson,* 350 U.S. 497, 502 (1956).

2. The federal interest in the subject matter is dominant, and the state interest is nil.

Under the rubric of dominance of the federal interest in the subject matter two inquiries are subsumed: the nature and extent of the federal interests and the nature and extent of the state interests.

(a) The Federal/Tribal Interests.

The dominance of the federal interests in the subject matter seems not to be disputed. The Arizona court conceded that "the federal government may have a dominant interest in the harvesting of tribal lumber." (Pet. App. 30a-4.) The State also appears to concede as much.[21]

Again, the dominance of the federal interest stems from at least the following factors:

1. The exclusive federal responsibility over the affairs of Indian tribes on their own reservations;

2. The exclusive federal and tribal responsibility for the regulation and use of reservation trust land, which includes tribal roadways;

3. The federal fee interest in the timber and the exclusive tribal beneficial interest in the timber;

4. The federal trust responsibility to assure best utilization of the timber for the sole benefit of the Indians;

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[21] *Cf.* Respondents' Brief in Opposition to Petition for Writ of Certiorari 10 (conceding that "there is a federal objective of fostering and promoting Indian forestry programs.").

5. The century-long congressional policy that Indian timber should be used to provide on-reservation employment of Indians in order to strengthen reservation economies, to alleviate Indian poverty, and thus to arrest the decay of Indian communities, culture, and family life;

6. The federal statutory responsibility for unitary management of the entire forest on a sustained-yield basis in order to best compromise all the values of the forest—economic, aesthetic, environmental, and recreational—for the sole benefit of the Indians;

7. The Tribe's federally authorized and approved rights under its constitution and bylaws to control its lands, resources, economic enterprises, and timber in particular.[22]

In summary, the forest is a complex and sometimes fragile ecosystem. The underdeveloped economies of many reservations are often only marginally able, or frankly unable, to provide Indian peoples with a minimally decent living. On the many reservations possessed of commercial timber resources the ecosystem and the economic system can be successfully managed and improved together or not at all. Both responsibilities are overwhelmingly that of the federal government in cooperation with its Indian beneficiaries.

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[22] The tribal constitution confirms the tribe's powers "to protect and preserve the . . . natural resources . . ." (Art. V § 1 (f), *infra* A-9); "to regulate the uses and disposition of tribal property" (Art. V § 1 (h), *infra* A-9); "to manage all economic affairs and enterprises of the tribe including tribal lands, *timber, sawmills,* flour mills, community stores, and any other activities" (Art. V § 1 (i) [emphasis supplied], *infra* A-9); "to provide by ordinance for the assignment, use or transfer of tribal lands within the reservation." (Art. V § 1 (m), *infra* A-10).

The restatement of these powers in the tribal constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476 (1976), confirms the tribe's federally-protected enjoyment of these powers. *See Quechan Tribe of Indians v. Rowe,* 531 F.2d 408, 410-11 (9th Cir. 1976); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975).

(b) The State Interests.

To determine whether these federal/tribal interests, great as they appear, are "dominant," it must also be asked how substantial the state's bases are for coming upon the scene and laying claim to "its share" of the tribal forest resource. We are distinctly disadvantaged in attempting to discuss the state's specific and substantial interests in taxing the use of reservation roads by the tribal enterprise's agents. This is because in the entire history of this litigation the state has never put forward any specific interest which it thinks in fairness ought to weigh in favor of these taxes. Rather, in their briefs in the Arizona state courts and in their Brief in Opposition to Petition for Writ of Certiorari filed in this Court, the State has put forward only an abstract response to the preemption claim.

That response is that the admittedly dominant federal interests in the subject matter, weighty though they be, have not yet resulted in express and literal prohibitions of state commercial gross receipts taxes and fuel taxes on the use of tribal roads by agents of tribal timber enterprises.[23] The State then argues that in the absence of such an express prohibition the weighty federal interests cannot be weighty enough to overcome the State's secret and unarticulable interests in taxing these activities.[24] This response cannot be sufficient to rebut a substantial claim of preemption of state taxes. It is nothing less than a claim that no state tax can ever be excluded by federal law unless it is proscribed by name—which is patently not the law.

The State's sole reliance on its presumptive right to tax non-Indians constitutes a refusal to undertake the close inquiry into the substance of the regulations and into the specific governmental concerns of the United States and of

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[23] We think there are two such literal prohibitions found in the Arizona Enabling Act, 36 Stat. 557, 569 (1910) and 25 C.F.R. § 1.4 (1979); however, the grant of certiorari excluded consideration of the Enabling Act and the regulation.

[24] *Cf.* Respondents' Brief in Opposition to Petition for Writ of Certiorari 1-26, especially 15 & 16.

the State which is called for under preemption doctrine. Instead, the State tells us that though the Tribe has articulated federal interest after federal interest and though those interests weigh heavily indeed, they simply do not weigh enough to yet obligate the State to place its first gram-weigh on the scale of analysis.

Though the State has yet to reveal any specific and palpable justification for these taxes beyond its theoretical desire to tax anything it likes, perhaps the State will finally remove the bushel basket from over its candle when it files its answering brief in this Court. Until then, we can at least point out the following circumstances which we think show the State cannot seriously claim *any* specific interest in taxing these activities, much less any interest which could even approach the importance of the federal interest in the harvest of Indian timber.

The fundamental background fact is that the federal government has left the State of Arizona largely free of responsibilities or duties respecting Indian reservations. As the Court noted in *Warren Trading Post,* Arizona is specifically free from the duty to provide local roads for the use of the tribe. 380 U.S. at 690.

From that general fact, we come to the specific fact that the State of Arizona pays nothing to build, maintain or police the tribal roads it wishes to tax. But both the motor carrier license tax (which is a tax on using roads in certain commercial activities) and the use fuel tax (which is a tax on the consumption of fuel *on roads*) are used for road building and maintenance, and both are said to "compensate" the state for the use of "its" roads.[25]

Thus, though the justification for both taxes is to build and maintain state roads with funds derived from the use of those roads, application of those taxes in this case will result in the building and maintaining of off-reservation state roads from the use of tribally built and maintained

[25] Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.); *Campbell v. Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966).

reservation roads. As applied here, the State is not attempting to fairly allocate the cost of its public improvements to those who use them. Rather, the State instructs the Indians that they may not build their own dirt roads on their own reservations for the use of their own agents on their own business unless they are willing also to pay for paving the State's roads. The State's own justification for the fairness of its tax in general demonstrates its unfairness in this case. The State of Arizona wants something for nothing.

Nor is this a case in which the State might claim to tax the non-Indian's transaction with the Tribe because some of the aspects of the transaction take place off the reservation. Without presuming to state how much weight, if any, that argument should carry in general, in this case that argument carries no weight, since the entire activities of Pinetop Logging Company and of FATCO occur on the Fort Apache Reservation.

In some situations, the State may have an interest in taxing non-Indian activities on Indian reservations for purely defensive reasons. That is, unless the tax is allowed, any tax immunity might be manipulated—or perhaps abused—by inducing non-Indian activities which would otherwise take place off the reservation to relocate onto the reservation solely in response to the state tax immunity. For example, this can happen if price elastic sales to non-Indians are immunized from state taxes.[26] The tribe or the Indians could then profit from "marketing" tax immunities to non-Indians to the detriment of the State's legitimate off-reservation regulatory and revenue-raising objectives.

[26] By contrast, there is little risk of such expansive withdrawals of activities from state taxing authority when the non-Indian sells goods or services to the Indian for use on the reservation. This case and *Central Machinery Co. v. State of Arizona,* No. 78-1604, are instances of sales of goods (*Central Machinery Co.*) and services (this case) to tribes on the reservation.

Thus, we may assume that one indicium of state interest in taxing non-Indian activities on the reservation is whether the specific immunity is capable of an abusive expansion beyond its fair justification and that possible abuse is not preventable by principled judicial restrictions on the immunity. For example, in *Colville*[27] the Tribes claim that all state taxation of non-Indian purchases on the reservation should be excluded. The loss to the state treasury there is not limited by the needs of any specific federal program, nor by the purchasing needs of the Tribe itself, nor is it even limited to those sales of goods and services which occur for the use of Indians on the reservation. They do not claim an immunity for specific activities which occur on the reservation for the benefit of Indians and which have independent economic justification for occurring on the reservation. Instead, they claim that state taxes must yield precisely because the sole economic viability of the smoke shop business rests on the non-Indian buyers' hope for evading state taxes. Thus, in that case it is argued that the very fact that the immunity is capable of being sold to a non-Indian is a reason for recognizing the immunity. By contrast, we submit that a reason why the immunity claimed by the Tribe here should be upheld is precisely that this immunity is *not* saleable.

The tax immunity we claim will not cost the state one nickel in lost revenues from tax-motivated relocation of activities which would otherwise take place off the reservation. The tax immunity is incapable of expansion because, by definition, the immune activity—hauling tribal timber from where it is cut on the reservation to the tribal sawmill on the reservation—can only take place on the reservation. The immunity we claim is restricted to the scope of its justification by the very nature of trees and roads themselves.

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[27] *Washington v. Confederated Tribes of the Colville Indian Reservation*, No. 78-630.

In summary, though the risk of abusive marketing of a tax immunity may be one general consideration which *may* weigh in favor of the state's interests, in this case that risk is nil.[28] Hence, that state interest totals at zero in this case. The State of Arizona has nothing to weigh against the federal/tribal interests here. The federal/tribal interests are plainly dominant.

3. Interference with federal administration.

The most immediate and dramatic interferences with administration of the federal Indian timber program that flow from imposition of the state's unrelated revenue raising objectives on that program are the interferences with the economic objectives of that program. For convenience we shall separately discuss those effects in the following subsection of this brief since we submit that the interference with those specific objectives is clear enough to preclude the state taxes whether or not the timber regulation as a whole is deemed to occupy the field to the exclusion of all state jurisdiction. However, there are several obstructions to federal administration which are distinct from the obstructions of the federal economic objectives. We discuss them here.

Collection of these state taxes would in many ways undercut the long-established objective of involving the Tribe itself in the control of timber on the reservation (under the tutelage of the United States). This is discussed in more

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[28] Because the tax immunity we claim here is totally incapable of abusive expansion or "marketing," perhaps this is not the case for defining exactly when the potential for inappropriate and judicially uncontrollable expansion becomes so great that the state's interest in avoiding that abuse preponderates against the tax immunity. Therefore, we do not presume to state precisely where the line need be drawn. It suffices that this case falls on the tribal side of any line which may be drawn.

detail in the infringement section of this brief. If this state taxing jurisdiction is upheld, the Indians will learn, not the arts of controlling their own affairs, but rather the arts of state-law tax planning.

Another important obstruction of the federal administration is the interference with the sustained-yield management policies required by Congress. The statutes and regulations place upon the federal administrators the duty of managing the entire forest ecosystem and of best compromising all the competing values of the forest. As four members of this Court stated in *United States v. New Mexico*, 438 U.S. 645, 98 S. Ct. 3012 (1978) (dissenting opinion):

> [T]he modern view of the forest [is] as an interdependent, dynamic community of plants and animals:
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> > "The forest community, then, consists of an assemblage of plants and animals living in an environment of air, soil, and water. Each of these organisms is interrelated either directly or indirectly with virtually every other organism in the community. The health and welfare of the organisms are dependent upon the factors of the environment surrounding them; and the environment surrounding them itself is conditioned to a considerable degree by the biotic community itself. In other words, the plants, the animals, and the environment—including the air, the soil, and the water—constitute a complex ecological system in which each factor and each individual is conditioned by, and in itself conditions, the other factors comprising the complex.' S. Spurr, Forest Ecology 155 (1964). 98 S. Ct. at 3025 n. 4.

The interrelatedness and delicacy of the forest system which modern physical and biological sciences teach us have been fully appreciated by Congress.

Thus, when the state lays claim to a first call on many tens of thousands of dollars generated from the forest utilization program, it necessarily must affect the ability of the Tribe and of the federal administrators to effect reforestation, fire control, wildlife promotion, road improvement, safety inspection, and general policing of the forest out of those same revenue sources. Obviously, to the extent the state can claim some of the forest resource for paving its off-reservation roads, the Tribe and the federal administrators have that much less available to them to do the things which Congress has instructed them to do in the forest itself.

It can not be assumed that the federal management of Indian forests has been so successful that the resource can be diverted without consequence. Indeed, in its *Final Report* 324-28 (1977), the American Indian Policy Review Commission, a two-year Congressional study, concludes that the potential benefits from timber have not been achieved, in large part because of the BIA's lack of success at comprehensive management.[29]

Neither the State itself nor the state courts below deny that what the state gets the forest program must lose. The lower court, however, justified this exaction by saying that the amount taken was, *in the State's view*, not large enough "to bring a net million and a half dollar operation to its knees. . ." (Pet. App. 31a-1.) But we have already demonstrated (*supra*, 15-16), that the actual economic impact of this taxation upon the Tribe is many times greater than the state court was willing to acknowledge. But more importantly the very point of the preemption doctrine is that the self-interested state tax officials are not the persons to whom Congress has allocated the delicate judgments to be made in this regard. It is precisely because the judgments are delicate, difficult, and interrelated that they must be made by one authority with unitary responsibility. The Arizona tax officials in Phoenix are hardly in a good position

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[29] The *Final Report* also shows the importance of Indian timber resources throughout the country:

> One-fourth of all Indian lands are forested, and 10 percent of all Indian lands are commercial forest lands. Timber contributes from 25 to 100 percent of tribal revenues for 57 reservations; more than 80 percent on 11 of these reservations. . . . *Id.* at 324.

to judge when they have bled the White Mountain Apache Tribe's timber program of too much of its financial strength and thus have finally brought it "to its knees". It is no justification for allowing the wolves to guard the sheep to say that the wolves think the sheep are still doing well enough despite their losses.[30]

Unitary management of the forest by the federal officials in cooperation with the Tribe is necessarily hindered by the state's competing attempt to manage the forest for the sake of financing its off-reservation highways.

In summary, the Federal government has completely occupied the field of Indian timber harvesting to the exclusion of state taxation of the same activity.[31]

D. The State Taxes Obstruct the Specific Federal Economic Objectives of Indian Timber Regulation.

It seems true to the point of tautology that if the State of Arizona can drain tens of thousands of dollars in revenues out of the timber harvesting program, the Indians will to that extent not "receive... the benefit of whatever profit [the forest] is capable of yielding.. 25 C.F.R. § 141.3(a) (3)

[30] While we do not question the bona fides of the Arizona Court of Appeals, Indian people will surely be cynical at the suggestion that they are so prosperous on their dirt roads that they should be forced to help pave the State's roads. The Arizona court's remark about the financial ability of this Tribe to pay taxes to the State was made in total ignorance of the actual expenses of the Tribe's governmental and welfare programs, of the status of employment on the reservation, of the quality of Indian health, of the quality of reservation transportation, and of the adequacy of Indian education, to name only a few of the considerations relevant to whether the Tribe is "prosperous."

[31] There appears to be only one other reported decision on the preemptive effect of Indian timber regulation. *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N. D. Cal. 1977) holds that by virtue of congressional occupation of the field, and not because of any specific conflict with federal objectives, the federal common law of contracts rather than state contract law governs timber contracts between tribes and timber companies. That is a far more expansive preemption of state law than the tax preemption claimed in this case, and it is plainly in conflict with the analysis and holding of the Arizona Court of Appeals.

(1979). The specific economic objective of securing the entire benefit to the Indians is as clear as the objective of the Indian trader regulations to secure fair and reasonable prices for goods sold to Indians. The actual interference with this objective by state taxation is far clearer in this case than the interference with the fairness of the prices of goods sold to Indians that would flow from a 2% retail markup to cover a state sales tax. The express federal policy of securing the entire financial benefit of the forest to the Indians is plainly and literally defeated dollar-for-dollar by the collection of these state taxes.

Historic federal desires to promote on-reservation employment through timber utilization are also hampered by these state taxes. FATCO itself employs some 300 members, and the non-Indian loggers employ an additional 50 to 100 members under the Indian employment preferences in their contracts. (App. 8-9.) To the extent the marginal profitability of the enterprise is lower, the enterprise as a whole is compelled to eliminate marginal labor expenditures. Thus, fewer Indians are employable on the reservation and more of them are forced into the cruel dilemma of choosing between poverty and the abandonment of their reservation homes, families, and cultures. Nothing in the history of Indian timber regulation suggests that this most tragic failing of American Indian policy is to be tolerated to the slightest extent for the sake of paving roads in Phoenix and Tucson.

Finally, even if the State did provide actual services to the tribal harvesting program (which it does not), any attempt to justify taxes based on such services would run at specific cross-purposes to legislation under which the

United States (not the states) may charge for services provided to timber programs.[32]

Thus, federal economic purposes of every sort are violated by the collection of these taxes.

E. The Use of Tribal Roads and the Burning of Fuel to Haul Tribal Timber Stands at the Center of the Preemptive Force of the Federal Regulatory Plan.

Assuming as we do that federal Indian timber regulation has preemptive force against state taxation, then the final question is whether the particular state taxes in this case fall under the proscription of that preemption. In this case it is apparent that the taxed activities—burning fuel on tribal and BIA roads and earning gross receipts from hauling timber to the tribal mill on those roads—stand at the very core of the timber harvesting program. Whatever else the Indian timber industry may include, getting the trees to the mill is an essential part of it.

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[32] The relevant statutes are as follows:

The Secretary of the Interior is authorized to charge purchasers of timber on Indian lands that are held by the United States in trust, or that are subject to restrictions against alienation or encumbrance imposed by the United States, for special services requested by the purchasers in connection with scaling, timber marking, or other activities under the contract of purchase that are in addition to the services otherwise provided by the Secretary, and the proceeds derived therefrom shall be deposited to the credit of the appropriation from which the special services were or will be provided. 25 U.S.C. § 407d (1976).

The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds. 25 U.S.C. § 413 (1976).

Because these two state taxes touch activities central to the timber harvesting program, this Court need not judge in this case, any more than it did in *Warren Trading Post*, precisely how wide the preemptive reach is. It is sufficient that, if the scheme has any preemptive significance at all, that significance must be felt here.

III. THESE STATE TAXES ON THE TRIBE'S AGENTS IMPERMISSIBLY INFRINGE ON TRIBAL SELF-GOVERNMENT.

A. The Infringement Doctrine

Even in the absence of specific statutes or regulations in point, challenges to state jurisdiction on Indian reservations are measured against the fundamental principle that state law is allowed to reach into the Indian reservation only to the extent that it can do so without infringing "on the right of reservation Indians to make their own laws and be ruled

by them."[33] *Williams v. Lee*, 358 U.S. 218, 220 (1959). *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), makes clear that application of state law to Indians on the reservation is presumptively invalid absent specific congressional approval. The infringement rule is meant to test the permissible scope of state power over the non-Indian aspects of transactions on reservations involving both Indians and non-Indians:

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[33] The infringement doctrine takes its roots in the doctrine of tribal sovereignty—the recognition that the Indian tribes preexisted the Constitution as sovereign political entities and continue to exercise governmental powers under the protection of the United States. That doctrine was first articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). "It followed from this concept ... that state law could have no role to play within the reservation boundaries." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973). As is stated in *United States v. Wheeler*, 435 U.S. 313 (1978):

> The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'* F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)....
>
> Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' United States v. Kagama, supra, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised....
>
> ... The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufference of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. See Oliphant v. Suquamish Indian Tribe, ante, p. 191. 435 U.S. at 323-24.

In summary:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. *McClanahan, supra*, 411 U.S. at 172.

> In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interest up to the point where tribal self-government would be affected. *Id.* at 179.

While there is no *general* immunity of non-Indian activity or property from state regulation or taxation, specific instances of taxation of non-Indians must pass muster under the infringement test.

In recent times, this Court has spoken only twice with respect to how the infringement test applies to state taxation of non-Indian activities on the reservation.

The first was a considered dictum in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170 n. 6 (1973), stating that the Arizona gross receipts tax on the non-Indian retailer in *Warren Trading Post* was infirm under the infringement doctrine. The non-Indian loggers on the Fort Apache Reservation are identically situated to the non-Indian retailer in *Warren Trading Post*. In both cases, goods and services are sold to the Indians on the reservation. Both activities have independent economic justification for occurring on the reservation. In both instances, the economic burden of the state tax falling on the non-Indian unquestionably passes to the Indians (or the Tribe) for whose benefit the goods or services are sold. In both instances, the ouster of state taxing jurisdiction is limited and precisely coextensive with the federal objective of freeing Indians from actual burdens of state law, even where the legal incidence of the burden falls on a non-Indian.

This Court's second application of the infringement doctrine to non-Indians is *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which found no infringement on tribal self-government from state taxation of

cigarette purchases by non-Indians. That claim of infringement was rejected because "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." *Id.* at 481-82.

Indians or the tribes would have financially benefited in each instance. However, the infringement claim was accepted in the *McClanahan* dictum concerning *Warren Trading Post* while it was rejected in *Moe* because of a difference in the character of the financial benefit which would have accrued to the Indians in each case. Where the financial burden of the tax upon the non-Indian does in fact pass to the Indians or the tribe and the sale is of goods or services used by the Indians or the tribe on the reservation, immunity under the infringement doctrine is appropriate because it frees the Indians themselves of state law burdens on their own affairs. It infringes on tribal government for the state to in fact burden the Indians for their own personal needs on the reservation.

In contrast, recognition of an infringement claim in *Moe* would not have benefitted the Indians with respect to their own personal needs but, rather, would have delivered to them an entrepreneurial advantage to the benefit of the non-Indian buyer. But it is considerably removed from the purpose of leaving the Indians alone to allow them to sell to non-Indians as well the privilege of being left alone by the state.

Infringement doctrine immunity of sales to Indians on the reservation is tied to the historic federal purposes and limited to its justification.

B. Specific Interferences With the Governmental Freedom of the White Mountain Apache Tribe.

If additional and more specific interferences with the governmental freedom of the White Mountain Apache Tribe are sought, they are not difficult to find.

First, these taxes interfere with tribal judgments about who may use tribal roads, for what purposes, and on what conditions. These taxes seek to impose additional burdens on those the Tribe has authorized to enter and use reservation roads. In this case, these taxes would totally deter Pinetop from coming onto the reservation and hauling and using fuel thereon, had the Tribe not agreed to pay these taxes in the future for Pinetop if they are found legal.

The taxes infringe on tribal control of its timber resources by conditioning non-Indian hauling of timber on tribal and BIA roads upon payment of taxes to the state.

An even more direct infringement is that the tribal choice of the means of managing and harvesting timber is hampered. After experimentation, the Tribe consciously chose to contract out its logging because it was more economical and efficient to do so. If these taxes are upheld, the Tribe may have to do its own logging in order to avoid these substantial additional costs. (App. 11-12.)

One of the Tribe's specific reasons for contracting out logging was the great capital cost of doing its own logging. Forcing the Tribe to do its own logging to avoid these taxes will drastically interfere with the Tribe's judgments about the management of tribal economic affairs and business enterprises and its choices of how to invest tribal funds. Those rights are reserved in the Tribe itself under its federally approved constitution and by-laws. (Art. V, § 1 (i) and (k), *infra*, A-9.)

These taxes, because they must ultimately be borne by the Tribe as a business cost, bear directly upon the planning and scope of reservation economic development, which is likewise the prerogative of the Tribe under the supervision of the federal government. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664 (9th Cir. 1975).

As has been explained in detail, these taxes on hauling and fuel consumption on Indian roads in the logging of Indian timber will also interfere with a specific objective of the White Mountain Apache Tribe to promote road construction and maintenance as a by-product of the timber harvesting program.

C. The State of Arizona has no Substantial Interest in Taxing the Tribe's Loggers; Only the Fact that the Technical Incidence of the Tax Falls Upon Non-Indians Favors the State, but that Fact Alone Is Insufficient to Rebut a Substantial Showing of Infringement.

Since the infringement doctrine is the residual tool for preventing inappropriate extension of state jurisdiction onto Indian reservations, analysis under that doctrine ought to take account of the interests of the state in exercising a particular jurisdiction. This Court has acknowledged that "notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests in regulating the affairs of non-Indians." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973). Without pretending to exhaustiveness, the following circumstances at least would be worthy of examination in determining the nature and the legitimacy of the state's interests as well as the Tribe's:

1. Situs of the transaction, either entirely or largely on the reservation.

2. Proximity of the subject matter to traditional interests of Indians or of the Tribe.

3. Whether recognition of state authority over the non-Indian aspects of the Indian/non-Indian transaction will, as a practical matter, impair the Tribe's authority over the Indian aspects of the transaction.

4. In tax questions in particular, whether recognition or rejection of the claim of immunity from state law will result in unfair misallocations of the costs and benefits of public services.

5. Whether the exclusion of state jurisdiction can be abusively expanded so as to injure a state's economic or regulatory interests disproportionately to the protection of Indian interests that would flow from recognition of the immunity.

6. Proximity of the subject matter to a field of specific congressional concern.

Again, while this list of major inquiries to be made in any attempt to balance competing tribal and state interests in any given infringement problem is not exhaustive, it is more than adequate for purposes of this case. All of these considerations have previously been discussed at length in the preemption sections of this brief. It is submitted that the identification and quantification of the tribal and state interests in each of these respects leaves the State of Arizona with nothing to place on the balance. All the State of Arizona can point to here is the fact that the technical incidence of these taxes falls on a non-Indian. But that single factor can never be sufficient to reject a substantial claim of infringement since the very purpose of the infringement doctrine is to test the permissibility of applying state laws to non-Indians on the reservation.

A simple example of this mode of analysis, and a clearly correct application of the infringement doctrine, is found in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission,* 588 F.2d 75 (4th Cir. 1978) (petition for certiorari pending, No. 78-1653). That case held that the infringement doctrine prevented a state from applying its fishing regulations to and exacting its fishing license fees from non-Indians who fish on reservation streams stocked entirely by the tribe and by the federal government. The state had no part at all in this purely commercial fishery operation by the tribe:

> . . . [W]e can conceive of no possible interest of North Carolina in this purely commercial undertaking, while the stocking of the streams and the licensing of visiting fishermen by the Band is an established program of the Bands from which the Tribe itself and its members derives substantial economic benefits, benefits which are greatly diminished by North Carolina's enforcement of its own fishing licensing laws." 588 F.2d at 79.

Significantly, the Fourth Circuit does not uphold a general immunity of non-Indians from state fishing regulations on Indian reservations but rather upholds an immunity in the particular circumstances of the case before it under which the state can show "no possible interest" in intruding into and taxing non-Indian participation in the Tribe's "purely commercial undertaking."

Similarly, the State of Arizona has no conceivable interest in taxing the use by the Tribe through its agents of tribal and BIA roads not in any way supported by the state.

In summary, application of the infringement doctrine will be difficult in many cases since that doctrine rests on the achievement of general public values in the field of Indian affairs rather than in the application of precise legal rules. The possible difficulty of applying those general principles in marginal cases cannot disguise the fact that in this case all the public values to be accommodated by the doctrine weigh in favor of the tribal claim of infringement. The state has no equities at all here.

IV. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE STATE TAXATION OF MOTOR FUEL USED ON TRIBAL ROADS, RATHER THAN STATE ROADS, ON INDIAN RESERVATIONS.

The Hayden-Cartwright Act, 49 Stat. 1519, 1521-22, originally enacted in 1936 and later amended in 1940 in § 7 of the Buck Act, 54 Stat. 1059, 1060-61, authorizes state motor

fuel taxes in certain federal reservations. It is now codified at 4 U.S.C. § 104 (1976).[34]

Though it made fleeting reference to this statute in the trial court, the State of Arizona has, with good reason we think, not thought this statute deserving of argument or even citation either in the Arizona appellate courts or in its Brief in Opposition to Petition for Writ of Certiorari filed in this Court. For the sake of completeness we wish to state summarily the reasons why this statute has no application to this case.

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[34] The act provides in pertinent part:
(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, comissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

Even assuming this Act was intended to apply to Indian reservations,[35] the legislative history shows it was intended at most to permit state taxation of motor fuel used on state highways. Nothing suggests it was also meant to allow state taxation of fuel used on tribal roads by the tribe's own agents. The legislative history of the Act, which was originally passed as an amendment to the Federal Aid Highway Act of 1916, 39 Stat. 355, is conveniently given in *State of Minnesota v. Keeley*, 126 F.2d 863 (8th Cir. 1942). The Act originally passed the House without inclusion of what is now 4 U.S.C. § 104. That section was added to the bill as a floor amendment in the Senate at the request of Senator Hayden, who indicated that the amendment was being offered in response to a resolution adopted by the Western Association of State Highway Officials, which he read to the Senate. The amendment was adopted without further discussion.

[35] The Committee Reports and the floor debates on this statute do not show any reflection on the possible application of the Hayden-Cartwright Act to Indian reservations. The Hayden-Cartwright Act was amended by the Buck Act, 4 U.S.C. §§ 105 *et seq.* (1976), which broadened its effect to generally authorize the collection of state sales taxes, use taxes, and income taxes on federal enclaves. However, the Buck Act has been construed not to extend to Indian reservations. Thus, state taxation of the gross receipts of a non-Indian retailer on an Indian reservation is not authorized by the Buck Act. *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 691 n. 18 (1965); *accord*, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 176 (1973) (which, interestingly, cites 4 U.S.C. § 104 as being part of the Buck Act—an accurate characterization in light of the Hayden-Cartwright Act's amendment by and integration into the more comprehensive Buck Act).

This holding with respect to the Buck Act would appear to apply to the Hayden-Cartwright Act as well since it was integrated into the Buck Act. The Senate Report on the Buck Act states:

> Section 7(a) of the committee amendment amends § 10 of the Hayden-Cartwright Act so that the authority granted to the states by such § 10 will more nearly conform to the authority granted to them under § 1 of this Act [the Buck Act].... S. Rep. No. 1625, 76th Cong. 3d Sess., 5 (1940).

The resolution of the state highway officials as read to the Senate clearly shows that the intent of the amendment was to end the unfairness of allowing certain users of public highways to escape paying their fair share of the gasoline taxes necessary to support those public highways. That resolution stated:

> Whereas this conference views with alarm the continued sale of motor vehicle fuels on Government military and other reservations, upon which no State Tax has been collected, *such tax-free fuel being used on the public highways* ... 80 Cong. Rec. 6913 (1936) (emphasis supplied)

Although there is no express reference to Indian reservations in the legislative history, it is obvious that to read the Hayden-Cartwright Act as permitting state taxation of fuel used on tribal roads would create a new unfairness while attempting to end an old one. The object of the Act was, simply put, to deprive a small class of users of state highways (people who purchase gasoline on military and other federal reservations) of an unjustifiable exemption from carrying their fair share of the cost of those state highways. This statute cannot be read as creating a precisely opposite unfairness: allowing the state highway system to reap windfall benefits from the use of tribal roads, which are not supported at all by state revenues, fuel taxes or any other taxes.

In any event, it should be recalled that in *Warren Trading Post*, this Court held in the alternative that even if the Buck Act otherwise consented to state sales taxation of non-Indians on Indian reservations, the Buck Act's consent would have to yield to the inharmonious congressional intent to free Indian reservation traders from state laws running at cross-purposes to the specific economic objectives of the Indian trader regulations. 380 U.S. at 691 n 18. Since state motor fuel taxation of the use of tribal roads in connection with tribal timber programs is similarly preempted by comprehensive federal regulation of the field, any general authorization of such taxation otherwise infer-

able from the Hayden-Cartwright Act must also yield to the preemptive intentions of Congress with respect to tribal timber use.

CONCLUSION

The judgment below should be reversed and remanded with instructions to grant judgment for the Petitioners for refund of the taxes paid under protest.

Respectfully submitted,

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A. *United States Constitution Art. I § 8*

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

B. *United States Constitution Art. IV § 3*

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

C. *25 U.S.C. § 196 (1976)*

Sale or other disposition of dead timber

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.

D. *25 U.S.C. § 406 (1976)*

Sale of timber on lands held under trust—Deductions for administrative expenses; standards guiding sales

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It

is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust of restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos men-

tis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be located by the Secretary after a reasonable and diligent search and the giving of notice by publication.

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other natural catastrophes.

E. *25 U.S.C. § 407 (1976)*

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

F. *25 U.S.C. § 466 (1976)*

Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

G. *25 U.S.C. § 476 (1976)*

Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

H. *25 C.F.R. §§ 141.3 and 141.4 (1979)*

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water runoff and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

§ 141.4 Sustained-yield management.

In accordance with the objectives set forth in § 141.3, the harvest of timber from Indian forest lands will not be authorized until there have been prescribed practical methods of cutting, based on sound silvicultural principles. Cutting schedules shall be directed toward the salvage of timber that is deteriorating as a result of fire damage, insect infestation, disease, over-maturity or other cause; and toward achieving an approximate balance between maximum net growth and harvest during each cutting cycle.

For all Indian reservations of major importance from an industrial forestry standpoint, management plans for the forest resource shall be prepared by the Bureau of Indian Affairs, and revised as needed. The plans shall contain a statement of the manner in which the policies of the Bureau of Indian Affairs are to be applied on the forest, with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specified period in the future.

I. *Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona* (Excerpts)

. . .

PREAMBLE

We, the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, in order to form a more representative organization, to exercise the duties and responsibilities of a representative tribal government, to conserve and develop our tribal lands and resources for ourselves and our children, to provide a higher standard of living, better home life and better homes within the reservation to extend to our people the right to form business and other organizations, do adopt this Constitution and Bylaws as a guide to our self-governing program.

ARTICLE I - STATEMENT OF PURPOSE

Section 1. In our relation to the United States Government, a relation similar to that which a town or a county has to a State and Federal Government, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the White Mountain Apache Tribal Council.

ARTICLE II - TERRITORY

The authority of the White Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the tribe, or which the tribe may acquire for itself.

. . .

ARTICLE V - POWERS OF THE COUNCIL

Section 1. In addition to all powers vested in the White Mountain Apache Tribal Council by existing law, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by the

Consitution or the Statutes of the United States applicable to Indians or Indian tribes, and subject further to all expressed restrictions upon such powers contained in this constitution and bylaws:

(a) To represent the tribe and act in all matters that concern the welfare of the tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws of the Constitution and Statutes of the United States applicable to Indians or Indian tribes.

(b) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or this Constitution and subject to the review and approval of the Secretary of the Interior where such review or approval is required by statute or regulation, with any person, association, or corporation, with any municipality or any county, or with the State of Arizona or the United States, including agreements with the State of Arizona for rendition of public services.

. . .

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interests in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the Government.

(f) To protect and preserve the wildlife, natural resources and water rights of the tribe, to regulate hunting and fishing on the reservation.

(g) To cultivate Indian arts, crafts, and cultures.

(h) To regulate the uses and disposition of tribal property.

(i) To manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities.

(j) To accept grants or donations from any person, State or the United States.

(k) To appropriate tribal funds for tribal purposes and to expend such funds in accordance with an annual budget approved by the Secretary of the Interior.

(l) To borrow money from any source and pledge or assign chattels or future tribal income as security therefor, subject to the review and approval of the Secretary of the Interior.

(m) To provide by ordinance for the assignment, use or transfer of tribal lands within the reservation.

(n) To enact ordinances subject to review and approval by the Secretary of the Interior covering the granting of both surface and subsurface leases for such periods as are permitted by law.

(o) To levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the reservation.

. . .

(q) To enact ordinances, subject to review and approval by the Secretary of the Interior, establishing and governing tribal courts and law enforcement among Indians on the reservation, regulating domestic relations of members of the tribe, but all marriages and divorces shall be in accordance with State laws, providing for appointment of guardians for minors and mental incompetents, regulating the inheritance of non-restricted real and personal property of members of the tribe within the reservation, and providing for the removal or exclusion from the reservation of any non-member of the tribe whose presence may be injurious to the people of the reservation.

(r) To enact ordinances governing the activities of voluntary associations consisting of members of the tribe organized for purposes of cooperation or other purposes.

(s) To regulate its own procedures, to appoint subordinate committees, commissions, boards, advisory or otherwise, tribal officials and employees not otherwise provided for in this Constitution and Bylaws and to regulate subordinate organizations for economic and other purposes.

(t) The Tribal Council of the White Mountain Apache Tribe may exercise such further powers as may be delegated to the Council by members of the tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

(u) The foregoing enumeration of powers shall not be construed to limit the powers of the White Mountain Apache Tribe.

J. ***Ariz. Rev. Stat. Ann.*** *§ 28-1551 (1979 Supp.)*
Definitions

In this article, unless the context otherwise requires:

. . .

3. "Fuel tank" means any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle, exclusive of a cargo tank. A fuel tank includes a separate compartment of a cargo tank used as a fuel tank and any auxiliary tank or receptacle of any kind from which fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

4. "Highway" means any way or place in this state of whatever nature, open to the use of the public, for purposes of traffic, including highways under construction.

5. "In this state" means within the exterior limits of the state of Arizona and includes all territory within these limits owned by or ceded to the United States of America.

6. "License" means use fuel tax license.

7. "Motor vehicle" means any self-propelled vehicle required to be licensed or subject to licensing for operation upon the highways.

8. "Person" means any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, municipality, district or other subdivision thereof, or any other group or combination acting as a unit.

9. "Sell" includes any transfer of title or possession, exchange or barter, in any manner or by any means whatsoever.

10. "Use" includes the placing of fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle unless the operator of the vehicle establishes to the satisfaction of the director that the fuel was consumed for a purpose other than to propel a motor vehicle on the highways of this state and, with respect to fuel brought into this state in any such receptacle, the consumption of the fuel in this state. A person placing fuel in a receptacle on a motor vehicle of another who holds a valid use fuel tax license is not deemed to have used the fuel.

11. "Use fuel" includes all gases and liquids used or suitable for use to propel motor vehicles, except such fuels as are subject to the tax imposed by article 1 of this chapter.[1]

12. "User" includes any person who, within the meaning of the term "use" as defined in this article, uses fuel.

K. ***Ariz. Rev. Stat. Ann.*** *§ 28-1552 (1979 Supp.)*
Imposition of Tax

For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state,

such tax to be collected and remitted to this state or paid to this state as follows:

1. By a vendor, measured by the volume of use fuel:

(a) Delivered by the vendor into the fuel tank of a motor vehicle not operated by the vendor, or

(b) Used by the vendor on the highways of this state in the propulsion of a motor vehicle operated by the vendor.

2. By a user, measured by the volume of use fuel imported into this state or acquired without payment of tax to a vendor within this state, and used in the propulsion of a motor vehicle on the highways of this state.

3. The tax, with respect to fuel acquired by any fuel user in any manner other than delivery by a vendor into a fuel tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of this state, and shall be paid over to the director by the fuel user with the report required and in accord with other applicable provisions of this article.

L. ***Ariz. Rev. Stat. Ann*** *§ 28-1556 (1979 Supp.)*
Presumption of use

A. For the proper administration of this article, and to prevent evasion of the excise tax, it shall be presumed, until the contrary is established by competent proof under rules and procedures the director adopts, that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel such vehicle, is consumed in propelling the vehicle on the highways of this state.

M. ***Ariz. Rev. Stat. Ann.*** *§ 40-601 (1974)*
Definitions

A. In articles 1 and 2 of this chapter, unless the context otherwise requires:

. . .

7. "Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property, for compensation, on any public highway, and not

included in the term common motor carrier of property, and, for the purpose of taxation, the owner of any motor vehicle in excess of six thousand pounds unladen weight who leases, licenses or by any other arrangement permits the use of such vehicle by any other, other than a common or contract carrier subject to tax under articles 1 and 2 of this chapter, for the transportation of property upon the public highway for compensation or in the furtherance of any commercial or industrial enterprise.

8. "Motor carrier" means any common motor carrier of property or passengers, or any contract motor carrier of property or passengers.

9. "Motor vehicle" means any automobile, truck, truck tractor, trailer, semi-trailer, motor bus or any self-propelled or motor driven vehicle used upon any public highway of this state for the purpose of transporting persons or property,[2] except farm tractors, implements of husbandry and other vehicles designed primarily for or used in agricultural operations and only incidentally operated or moved upon a highway, which shall be exempt from the provisions of this chapter.

10. "Private motor carrier" means any person not included in the term "common motor carrier" or "contract motor carrier" who transports by any motor vehicle in excess of six thousand pounds unladen weight property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in the furtherance of any commercial enterprise, but ownership of the property transported shall not be accepted as sufficient proof of a private motor carrier operation if the carrier is in fact engaged in the transportation of property for hire, compensation or remuneration, or if such transportation operations are conducted for profit and not merely as an incident to a commercial enterprise, provided that towing of disabled vehicles by tow trucks operated in connection with an automobile repair or service business or a wrecking yard shall be deemed to be incidental to a commercial enterprise, and the operator thereof shall be deemed to be a private motor carrier when engaged in such operations, and provided that transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the state of Arizona by a person in the business of harvesting such pulpwood logs shall be deemed to be incidental to a commercial enterprise and a pulpwood harvester transporting such pulpwood logs shall be deemed to be a private motor carrier when so engaged. For purposes of this paragraph "pulpwood logs" means logs which are used or intended for use as a raw material in the manufacture of pulp or paper.

11. "Public highway" means any public street, alley, road, highway or thoroughfare of any kind used by the public, or open to the use of the public as a matter of right for the purpose of vehicular travel.

12. "Superintendent" means the superintendent of the motor vehicle division of the department of transportation.

N. ***Ariz. Rev. Stat. Ann.*** *§ 40-641 (1979 Supp.)*

License tax upon motor carriers; collection; disposition

A. In addition to all other taxes and fees:

1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half per cent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government. The gross receipts from the operation for hire by a common motor carrier of property or a contract motor carrier of property of a farm tractor or implements of husbandry exempt from registration, whether incidental to the operations as such motor carrier or otherwise, shall not be subject to the tax imposed by, or other provisions of, this article.

2. Every common motor carrier of passengers and every contract motor carrier of passengers shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-quarter per cent of the gross receipts from his operations within the state for the preceding calendar month. The gross receipts from operation of public service corporations providing urban mass transportation service within urban areas and public transportation systems or services provided by counties, cities and towns or their contractors as authorized by chapter 6, article 5 of this title shall not be subject to the tax imposed by, or other provisions of, this article. The only gross receipts of a public service corporation providing urban mass transportation service within urban areas that shall not be subject to the tax imposed by this article shall be those gross receipts obtained from providing passenger urban mass transportation within the urban area.

B. When any carrier operates partly within and partly without the state, the gross receipts of the carrier within the state shall be deemed to be all receipts of business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which business is done, of receipts on all business passing through, into or out of the state.

C. Upon receipt of the taxes the department of transportation shall forthwith transmit them to the state treasurer, who shall credit them to the Arizona highway user revenue fund.